SUPREME COURT OF QUEENSLAND

CITATION:	*R v Manning* [2017] QCA 23
PARTIES:	**R** **v** **MANNING, Gregory Thomas** (appellant)
FILE NO/S:	CA No 183 of 2016 DC No 305 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Cairns – Date of Conviction: 9 June 2016
DELIVERED ON:	3 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	24 February 2017
JUDGES:	Morrison and Philip McMurdo JJA and Boddice J Judgment of the Court
ORDERS:	**1. The appeal against conviction is allowed.** **2. The conviction is set aside.** **3. A retrial is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF PROSECUTOR OR PROSECUTION – where the appellant was convicted of 20 counts of child sexual offences – where the appellant appeals the conviction on the ground that the prosecution's failure to call two witnesses resulted in a miscarriage of justice – where the appellant was tried on the same charges at two previous trials – where both witnesses gave evidence at previous trials, but not the trial which is subject to the appeal – where the respondent's case depended largely on the credibility of the complainant – where the respondent contended that the evidence of the witnesses was not material or would be unreliable – where the appellant submitted that the evidence was capable of affecting the jury's view of the complainant's evidence – whether the evidence of the two witnesses was material – whether the decision not to call the two witnesses, when viewed against the conduct of the trial as a whole, gave rise to a miscarriage of justice *Evidence Act* 1977 (Qld), s 21AK, s 93A

Dyers v The Queen (2002) 210 CLR 285; [2002] HCA 45, cited
R v Apostilides (1984) 154 CLR 563; [1984] HCA 38, cited
R v Jensen (2009) 23 VR 591; [2009] VSCA 266, cited
R v Manning (2014) 239 A Crim R 348; [2014] QCA 49, related
Whitehorn v The Queen (1983) 152 CLR 657; [1983] HCA 42, cited

COUNSEL: J R Jones with P Kinchina for the appellant
D R Kinsella for the respondent

SOLICITORS: Peter Shields Lawyers for the appellant
Department of Public Prosecutions (Queensland) for the respondent

[1] **THE COURT:** On 9 June 2016 the appellant was convicted of 20 counts of child sexual offences after a three day trial. The counts were:

(a) one count of maintaining a sexual relationship with a child;[1]

(b) five counts of indecent treatment of a child under 16, under 12 and under care;[2]

(c) two counts of rape;[3]

(d) one count of attempted sodomy of a child under 18, under 12 and under care;[4]

(e) seven counts of indecent treatment of a child under 16 and under care;[5]

(f) three counts of sodomy of a person under 18 and under care;[6] and

(g) one count of indecent treatment of a child under 16.[7]

[2] The appellant challenges these convictions upon the basis that the prosecution's failure to call evidence from two persons, his wife and his brother, resulted in a miscarriage of justice.

Previous trials

[3] There are pertinent matters that need to be understood, arising from the fact that the trial out of which this appeal arises is the third time that the appellant been tried on these charges.[8]

[4] The appellant was convicted of 20 charges at his first trial in May 2013. He successfully appealed against those convictions, on the grounds that certain evidence was wrongly admitted against him.[9] The convictions were set aside on 17 February 2014, and a retrial ordered.

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1 Count 1.
2 Counts 2-5 and 9.
3 Counts 6 and 7.
4 Count 8.
5 Counts 10, 11 and 13-15, 17-18.
6 Counts 12, 19 and 21.
7 Count 20.
8 As will appear, at the first trial he was acquitted of some of the charges then pressed, and the balance were the subject of the subsequent trials.
9 *R v Manning* [2014] QCA 49.

[5] The second trial was held in July 2014. That trial did not reach a verdict as the jury was discharged when one juror was found to have been carrying out some private research related to the case.

[6] At each of the first and second trials the appellant's wife, Mrs Manning, and his brother, Mr Phillips, gave evidence although in the defence case.

[7] From the third trial, which took place in June 2016, comes this appeal.

The factual background

[8] The background appears from the judgment of Morrison JA in this Court's decision from the appellant's first trial of these charges.[10] It is sufficient for the purpose of this appeal to adopt them:

> "[7] The complainant was a boy aged between 11 years and eight months and almost 13 years of age at the times of the offences. The appellant was a friend of the complainant's family. The families would from time to time go to each other's homes for barbeques, as a result of which the complainant developed a close relationship with the appellant and the appellant's son. The complainant also worked for the appellant in his juice delivery business. On occasions the complainant would stay overnight at the appellant's home.
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> [8] The offences all arose from circumstances when the complainant was spending time with the appellant at his home, or when they were working together. A schedule provided to the jury outlined the incidents which were the subject of each charge. They were as follows:

1	The sexual offending included the defendant sodomising the complainant, inserting his finger in the complainant's anus, touching and sucking his penis and having the complainant suck the defendant's penis. The offending happened at the defendant's house, his business premises and whilst driving with the complainant on business deliveries.
2	At the defendant's house in a shed toward the end of 2008. The defendant showed the complainant a pornographic magazine.
3	The defendant grabbed the complainant's penis out over the top of his pants and began sucking it.
4	In late 2008 the complainant was sleeping over at the defendant's house. The complainant was in the lounge room with the defendant. The defendant started giving the complainant a foot massage. The defendant then started massaging up the complainant's leg then touched the complainant's testicles. The defendant then touched the complainant's penis.

[10] [2014] QCA 49, [7]-[15] (internal footnotes omitted).

5	The defendant then removed the complainant's pants and put the complainant's penis in his mouth and sucked it.
6	The defendant then made the complainant undress so he was naked. The defendant then made the complainant suck his penis.
7	The defendant rubbed spit around the complainant's anus and then inserted his finger into the complainant's anus.
8	The defendant inserted the head of his penis into the complainant's anus.
9	The defendant then removed his penis from the complainant's anus and positioned himself so that the complainant's legs were around his torso. The defendant then masturbated himself to ejaculation and ejaculated onto the complainant's stomach.
10	In the cubby house, the defendant began rubbing the complainant's penis then sucked it.
11	The complainant was in the defendant's bedroom. Whilst in the bedroom the defendant sucked the complainant's penis.
12	The defendant then removed a tube of KY lubricant from his bedside drawer and began to rub some of the lubricant on the complainant's anus. The defendant then inserted one of his fingers in the complainant's anus.
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14	The defendant then removed his finger from the complainant's anus then forced his penis into the complainant's anus. The defendant forced his penis about halfway in.
15	The defendant then removed his penis from the complainant's anus then masturbated himself to ejaculation.
16	During a school holiday period. The defendant was near the vegetable patch. The defendant pulled down the complainant's pants, rubbed his penis then sucked it.
17	The defendant then asked the complainant, "Can you suck mine for a bit?" The complainant then put the defendant's penis in his mouth and sucked it.
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19	The defendant then pulled down the complainant's pants and pushed one of his fingers into the complainant's anus.
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21	The defendant then licked the complainant's anus.

22	The defendant then forced his penis into the complainant's anus. The defendant moved his penis in and out of the complainant's anus for a period of time.
23	The complainant recalls the defendant gave him a set of speakers. The defendant delivered them to the complainant's home and helped to set them up in the complainant's bedroom. Whilst the defendant was in the complainant's bedroom he exposed his penis to the complainant. The defendant also played with his penis.
24	The defendant sodomised the complainant at the depot near the area where the pallets were stored. The defendant ejaculated inside the complainant's anus.

[9] He was convicted on all but counts 8, 10, 12, 17 and 20. Although found not guilty on count 8 (sodomy of a child under 12, under care), he was convicted of the uncharged alternative (attempted sodomy of a child under 12, under care). He was found not guilty on count 10 (indecent treatment of a child under 16, under care), count 12 (rape) and count 17 (rape). No verdict was taken on count 20 (indecent treatment of children under 16, under care) as it was pleaded as an alternative to count 19 (rape) on which the appellant was convicted.

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[10] The complainant's evidence was given in the form of two statements under s 93A of the *Evidence Act* 1977 (Qld). His evidence included details of how he was a friend of the appellant's son and the occasions when he would sleep over at the appellant's house. At the time of the interview, the complainant had known the appellant's son for about four years, but the complainant did not "really hang out" with the appellant's son as he was two years younger than the complainant. In his evidence he also dealt with his relationship with the appellant, which included helping him in his work at his juice factory. That work lasted for over a year, and ceased at a time when the appellant had a fight with the complainant's parents.

[11] The complainant also gave evidence of having stayed over at the appellant's house, and how the appellant would teach his son, the complainant and another boy various things concerning bush craft, such as how to make a fire. He also described occasions when he, the son and another boy would go camping with the appellant.

[12] In his first interview the complainant was reluctant to participate, and especially reluctant to particularise any allegation of sexual offending by the appellant. On a number of occasions the complainant said he did not wish to speak about it and described the appellant as "just a good friend". He also expressed concern about whether the appellant was going to

get into trouble as a consequence of what the complainant was saying.

[13] In the second interview, however, the complainant went into considerable detail in relation to the offences. In many cases he described the appellant responding to his objections by telling him that it was all right or okay, and that nobody was judging the complainant. The complainant said a number of times that, effectively as a result of the appellant's assurances, he thought it was okay. On one occasion the complainant's objections were overcome by the appellant offering to buy him a pellet gun if the complainant let him continue.

[14] In his cross-examination the complainant reaffirmed the friendship that existed between the families, and in particular between himself and the appellant. He described them as being friends and that the appellant treated him more like an adult than a child. Together with the appellant's son they went four wheel driving, fishing and swimming. The complainant also described how he liked the appellant's wife and trusted her.

[15] The complainant was questioned as to why he did not object more strongly than he did to what was being done to him. His responses included that the appellant "was a friend" on occasions when he told the appellant to stop he did so and that the appellant was "a really good friend" and a friend he trusted."

The complainant's evidence

[9] The complainant gave evidence in the form of two statements under s 93A of the *Evidence Act* 1977 (Qld), and pre-recorded evidence under s 21AK of that Act. His evidence related:

(a) the locations where the offending conduct was said to have occurred, including the lounge room of the appellant's house, a shed on the property, the vegetable garden there, the appellant's bedroom, the appellant's business premises and the appellant's delivery truck;

(b) a number of the incidents having occurred in the appellant's house at times when others were in the house;[11]

(c) the complainant's relationship with Mrs Manning being that she cared for him, he liked her, felt quite comfortable being around her and would have had no problem calling out to her for help if he was in trouble;[12]

(d) incidents in the lounge room in late 2008[13] occurring whilst Mrs Manning was in the house, in her bedroom about 15 to 20 paces away,[14] when the appellant was said to have anally raped the complainant and attempted to sodomize him;

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11 AB 26 line15; AB 25-26 and AB 29 lines 24-29; AB 55 line 50 and AB 61 lines 23-40; AB 62 lines 30-55; AB 65 lines 1-8.

12 AB 29 lines 34-50.

13 The subject of counts 4-9.

14 AB 65 lines 1-8; AB 299 lines 31-51.

(e) that on that last mentioned occasion, he was being physically hurt and "in a panicked state" he called out the appellant's name "loudly", increasingly louder and knowing that Mrs Manning was about 15 paces away; he called partly to attract her attention and said that she "could've heard that, she would've heard that";[15]

(f) incidents in the vegetable garden in 2009,[16] including his being anally raped, occurring while Mrs Manning may have been in the house, probably in her office doing paperwork;[17]

(g) other occasions of offending when Mrs Manning was nearby;[18] and

(h) the number of times on which he slept over at the appellant's house, which he estimated varyingly at 12,[19] 12 to 13 or more,[20] or 10 to 15,[21] whilst also saying that he could not remember an accurate number of how many sleepovers but that "just like guessing", it was "between 6 and 10",[22] "every second week"[23] or "too many to count" (in 2008);[24] he rejected the suggestion that he had only stayed over three or four times, saying it was "probably 12 or something around there."[25]

Evidence from Mrs Manning

[10] The evidence which Mrs Manning and Mr Phillips might have given is indicated by the evidence which they gave at the earlier trials.

[11] Mrs Manning's evidence had been as follows:

(a) she remained married to, and living with, the appellant;

(b) she had read the complainant's statement;[26]

(c) as to how many times the complainant stayed over at their house at the first trial, she had a "specific memory" of "three or four";[27] she "thought" it was "three or four";[28]

(d) when asked in cross-examination whether it was hard to put a figure on how many times he stayed over because the complainant was a frequent visitor, she said: "only because … I'm debating whether it's three or four",[29] but that it would not be more than that;[30]

(e) she remembered the first time he stayed over, because he had slept all night, (contrary to his mother's concerns that he would not);[31]

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15 AB 65 line 29 to AB 67 line 7.
16 The subject of counts 14-15 and 17-19.
17 AB 312 lines 13-15.
18 AB 331 line 58 to AB 333 line 9.
19 AB 300 lines 8-20.
20 AB 306 lines 39-50.
21 AB 319 lines 14-26.
22 AB 335 lines 1-21.
23 AB 30 lines 12-19.
24 AB 31 lines 1-2.
25 AB 63 lines 31-41.
26 First trial, in cross-examination, AB 385 lines 1-36.
27 First trial (evidence-in-chief), AB 364 line 17 to AB 366 line 7.
28 First trial (cross-examination), AB 385 lines 38-40.
29 First trial, AB 386 lines 1-39.
30 First trial, AB 386 lines 36-39.
31 First trial AB 386 lines 40-55.

(f) she recalled another occasion when the complainant was staying over and he woke her during the night because he wanted to go home; she heard him as he walked up the hallway calling the appellant's name; the appellant, who was asleep in bed beside her, did not wake up; she gave him a Panadol as he said he had a headache; he did not settle again, and came back up to the room and called out to her; she rang the complainant's mother and she came and picked him up;[32]

(g) at the second trial, when asked about how many times the complainant stayed over, she said: "I'm thinking about three"[33] and when asked how many times in 2009, she said "I'm thinking maybe two" and that in 2009 "he rarely ever stayed over";[34]

(h) she said that the complainant and a boy (H) only stayed over the one time together, or possibly two;[35] at the second trial she could only remember one such occasion, and that she had no cause to get up during that night;[36]

(i) her main place of work (doing the bookwork for the family businesses) was in an area set up in the living room;[37]

(j) the house was such that she could hear what was going on in other rooms, such as when people were in the shower;[38]

(k) she sometimes went to bed ahead of the others; when she went to bed she mostly left her door only partly closed, to keep the light out;[39] she left a little gap open because it was too hot otherwise;[40]

(l) she said that in 2009 she was a light sleeper and on occasions when there were "sleepovers and if there was noise [she] couldn't sleep very well";[41] when asked if she was a heavy or light sleeper, she said "somewhere in-between … probably closer to light";[42]

(m) from her back window she could see all of the shed and the vegetable patch;[43] and

(n) she did not see anything untoward between the appellant and the complainant.[44]

Evidence from Mr Phillips

[12] At the earlier trials, the evidence of Mr Phillips centred around the times he went to assist the appellant at the appellant's work premises. His evidence had been as follows:

(a) he went to the premises numerous times to see the appellant and to assist him in various ways; he would go on Saturday and Monday mornings;[45]

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32 AB 408 line 38 to AB 409 line 12.
33 AB 408 line 35.
34 AB 412 lines 13-23.
35 AB 387 lines 9-37.
36 AB 409 lines 36-45.
37 AB 363 line 34; AB 383 lines 9-33; AB 407 line 40; AB 415 lines 6-18.
38 AB 367 line 31-40.
39 AB 374 lines 8-15.
40 AB 392 line 15.
41 Second trial AB 409 lines 21-23.
42 Second trial AB 409 lines 28-31.
43 AB 368 line 46 to AB 369 line 11; AB 410 lines 10-15.
44 AB 377 line 26-37.
45 AB 427 line 38 to AB 428 line11; AB 450.

(b) there was a pool shop which used the same general space as was used by the appellant's business, the two being separated by pallets[46] and at some point (he could not say when) a more permanent division was erected between the two businesses;[47]

(c) he had seen the complainant several times at the premises, on Saturday mornings, but he (Mr Phillips) did not attend every Saturday;[48] in cross-examination he agreed it was "numerous times";[49]

(d) he had seen the complainant doing deliveries with the appellant on some Saturdays;[50] and

(e) he had not seen anything untoward between the complainant and the appellant.[51]

The opposing cases at the trial

[13] The Crown case depended to a substantial degree on the credibility and reliability of the complainant; the prosecutor evidently described it as critical.[52] There was no medical or forensic evidence to corroborate his account, but there were pieces of evidence which, it was argued, provided some corroboration, such as the complainant's evidence as to a particular lubricant used by the appellant, what it looked like and where it was located. A tube of lubricant largely matching the description was located where the complainant said it was kept.[53] Also the complainant described the appellant as being uncircumcised, and an examination revealed that the appellant had been circumcised but a substantial portion of foreskin (perhaps two thirds) had been left in place.[54]

[14] The defence case was that none of the alleged events occurred, and that there was never an occasion of inappropriate touching. The brazen nature of the alleged conduct was highlighted, especially that which was said to have occurred when others (specifically Mrs Manning) were in the house or in a position to hear and respond.[55] Further, the defence address to the jury raised inconsistencies in the complainant's estimates of how many times he stayed over.[56]

A prosecutor's discretion

[15] The Crown prosecutor alone bears the responsibility of deciding whether a person will be called as a witness in the Crown case and a trial judge may not direct the prosecutor to call a particular witness.[57] A decision of the prosecutor not to call a person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.[58]

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46 AB 430.
47 AB 440-441; AB 450.
48 AB 434 lines 42-55; AB 450 line 42 to AB 451 line 5; AB 452 line 4.
49 AB 436 line 6.
50 AB 439 line 53 to AB 440 line 9.
51 AB 435; AB 451 line 17.
52 AB 237 line 30.
53 AB 238 lines 38-40.
54 AB 239 lines 5-7.
55 Summing up AB 239 line 30 to AB 240 line 5.
56 AB 241 lines 35-40.
57 *R v Apostilides* (1984) 154 CLR 563, 575 ('*Apostilides*').
58 Ibid.

[16] Nevertheless it can be relevant, as it is in the present case, to understand the reasoning of the prosecutor in deciding not to call the evidence because "in the great majority of cases of this kind an appellate tribunal which finds a miscarriage of justice to have occurred will trace that miscarriage to a wrong exercise of judgment by the prosecutor which led to the witness not being called."[59]

[17] At this trial, the appellant's counsel asked the prosecutor to call Mrs Manning and Mr Phillips and raised that request with the trial judge. When asked by his Honour to explain why Mrs Manning was not to be called the prosecutor referred to these factors:

(i) she had refused to give police a statement in the initial investigation;[60]

(ii) she had been a defence witness at the two previous trials;[61]

(iii) the jury evidently rejected her evidence by convicting at the first trial;[62]

(iv) she was quick to say that there were limited opportunities for the complainant to stay over;[63] and

(v) her evidence had developed in favour of the appellant on the issue of how many times the complainant had stayed over, from three to four at the first trial, to two in cross-examination.[64]

[18] When asked to explain why Mr Phillips was not to be called, the prosecutor said to the trial judge:

> "I'm not going to call Eric Phillips, your Honour, for, effectively, the same reasons I'm not calling Fiona Manning. Although, the difference is Eric Phillips was never approached, to my knowledge, to provide a statement. He gave evidence for the defendant in two previous trials. Nothing material has changed since those two trials in the three years. He was quick to say there's limited opportunity for the defendant and the child to be together particularly at the depot. The – your Honour may recall in the first trial a number of photos were led through him, and he was quick to say that the house was in immaculate condition all of the time. So there was an inconsistency – or we would say that that person's unworthy of belief, and that's not accepted by the Crown."

[19] If a witness is able to give credible evidence about matters directly in issue, that alone would ordinarily suggest that the prosecutor should call the witness.[65] A prosecutor should call all material witnesses, being those whose evidence is necessary to "unfold the narrative and give a complete account of the events upon which the prosecution is based."[66] A material witness should be called although that witness would give an account inconsistent with the Crown case.[67] The word "material" in this context should not be given any narrow meaning and "[a]ll the

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59 Ibid, 577.
60 AB 94 line 31.
61 AB 94 31-32.
62 AB 95 line 20.
63 AB 95 lines 5-6.
64 AB 95 lines 7-11.
65 *Dyers v The Queen* (2002) 210 CLR 285 at 292 [11] ('*Dyers*').
66 *Whitehorn v The Queen* (1983) 152 CLR 657 ('*Whitehorn*').
67 *Whitehorn* (1983) 152 CLR 657, 674; *Dyers* (2002) 210 CLR 285, 326 [118].

available admissible evidence which could reasonably influence a jury on the question of the guilt or otherwise of an accused is capable of answering the description 'material'".[68] A prosecutor is not bound to call a witness whose evidence the prosecutor judges to be unreliable, untrustworthy or otherwise incapable of belief.[69] But a suspicion by the prosecutor about the unreliability of evidence is not enough: the prosecutor's opinion as to the unreliability of the evidence will suffice only "where there are identifiable circumstances which clearly establish it".[70]

The uncalled evidence of Mrs Manning: was it material?

[20] We are of the view that the matters identified by the prosecutor about Mrs Manning were insufficient to displace the apparent materiality of her evidence.

[21] Several of the factors identified by the prosecutor about Mrs Manning were in the nature of an apprehension that she would not be an impartial witness. That apprehension was not unreasonable: Mrs Manning was married to the appellant and had an obvious interest in the outcome of the trial. But that was not to say her evidence was bound to be unreliable. Many witnesses, including those who are themselves parties to criminal or civil litigation, are interested in the outcome, but that interest does not, by definition, make them unreliable.

[22] The suggestion that the evidence would be unreliable, because the jury in the first trial must have rejected it, cannot be accepted. The outcome of the first trial was according to that jury's assessment of the whole of the evidence which was tendered at that trial. As this Court held, in granting the original appeal against the convictions, the reasoning of the jury in that trial may have been affected by the inadmissible evidence which resulted in the convictions from the first trial being quashed.

[23] One of the factors relied upon by the prosecutor and by the respondent in this appeal was the suggested inconsistency in Mrs Manning's previous evidence about the number of times on which the complainant had stayed the night in her house. It was argued that this demonstrated an inclination by Mrs Manning to tailor her evidence. However a careful reading of her evidence on this aspect does not bear that out. She initially said it was three or four, and assigned it as a specific memory in response to a leading question. Otherwise she said she thought it was three or four. At the second trial, she said she "was thinking about three", and when asked about 2009, she said "maybe two". The last response was in respect of a question which referred only to 2009, whereas the conduct spanned 2008 as well as 2009. Once that is understood, there was no apparent departure in her estimate from one trial to the other.

[24] Ultimately in this Court, counsel for the respondent appeared to accept that Mrs Manning's evidence would have been material. Notably the prosecutor at this trial did not suggest that Mrs Manning's evidence could have had no relevance to any issue. Notably also, her evidence was given in the first and second trials apparently without objection by the prosecutor. In our view her evidence was clearly material and its potential impact upon the outcome is considered below. It was not made immaterial by an apprehension that it could be unreliable because, in

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68 *Dyers* (2002) 210 CLR 285, 326 [118].
69 *Whitehorn* (1983) 152 CLR 657, 674-675.
70 *Apostilides* (1984) 154 CLR 563, 576.

our view, there were not identifiable circumstances which clearly established such an unreliability.

[25] As to the evidence of Mr Phillips, it may again be noted that the prosecutor's justification for refusing to call him was that his evidence would be unreliable rather than irrelevant. Again it would appear that his evidence at the previous trials had been given without objection. In our view his evidence was relevant and admissible. The suggested bases for the prosecutor's conclusion that it would be unreliable are from the passage which we have set out above. Again, an apprehended interest of this witness, as the appellant's brother, in the outcome of the trial did not clearly establish that his evidence would be unreliable. In our conclusion he was able to give material and not demonstrably unreliable evidence.

A miscarriage of justice

[26] In our view the failure of the Crown to call Mrs Manning resulted in a material miscarriage of justice because, as we will explain, it deprived the appellant of a chance of an acquittal. Before explaining that conclusion, it is necessary to say something of a submission for the respondent that there was no miscarriage of justice because it was open to the appellant to call the evidence in this trial, as he had done in his previous trials. It was submitted that there was no practical disadvantage to the appellant by having this evidence led in his case, rather than in the prosecution case. The right to cross-examine these witnesses was said to be an "illusory" advantage, because the experience of the earlier trials was that the evidence, if relevant, would be beneficial to the appellant's case. And it was said that any forensic advantage by having the final address to the jury (by the appellant not giving or calling evidence) would have been "significantly ameliorated given the settled nature of the evidence and previous addresses."[71]

[27] Those arguments cannot be accepted. Once it is seen that the evidence was material and not unreliable, the prosecution was obliged to lead that evidence because "a basic requirement of the adversary system of criminal justice is that the prosecution, representing the State, must act 'with fairness and detachment and always with the objectives of establishing the *whole* truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one'."[72] This is part of prosecutor's function ultimately to assist in the attainment of justice between the Crown and the accused.[73] A prosecutor is not relieved of that responsibility by the fact that the accused could elect to call that evidence. Rather, fairness requires the prosecution to produce all of the material evidence which is available to it before putting the defendant to his election as to whether to give or call evidence. Therefore, the fact that the defence was able to call the witness as a defence witness does not overcome the miscarriage of justice which occurs as a result of the Crown's refusal to call a material witness.[74]

[28] The complainant's evidence of the incidents in the lounge room covered counts 4 to 9, which included rape (count 7) and attempted sodomy (count 8). The complainant said:

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71 Respondent's Outline of Argument, [50].
72 *Dyers* (2002) 210 CLR 285, 293 [11] citing *Whitehorn* (1983) 152 CLR 657, 663-664.
73 *Whitehorn* (1983) 152 CLR 657, 675.
74 *R v Jensen* (2009) 23 VR 591, 604 [78].

(a) the offences occurred in late 2008[75] whilst Mrs Manning was in the house, in her bedroom about 15 to 20 paces away;[76] on that occasion the conduct included the appellant anally raping the complainant, and attempting to sodomize him; and

(b) on that occasion he was being physically hurt and he called out the appellant's name "loudly", "in a panicked state", increasingly louder and louder; he knew that Mrs Manning was about 15 paces away, and called partly to attract her attention; she "could've heard that, she would've heard that".[77]

[29] The evidence of Mrs Manning, if accepted by the jury, could have affected the jury's view of the complainant's evidence in those respects at least. The complainant said that he stayed over at the Manning house many times whereas Mrs Manning limited the occasions to three or four in number. There was a relevance in Mrs Manning's evidence as to what she did or did not hear or observe in the assessment of the complainant's evidence that on one occasion he called out so loudly that she would have heard him.

[30] For the respondent it is argued that there was no inevitable inconsistency between the complainant's testimony and the expected evidence of Mrs Manning. For example the complainant may have called out loudly but she may not have heard him. But that is merely to say that Mrs Manning's evidence, if accepted, would not have *inevitably* discredited the complainant. It is not to say that Mrs Manning's evidence had no potential to discredit the impact of the complainant's evidence or at least to leave the jury in doubt as to whether to accept it. Mrs Manning's evidence, if accepted, made the complainant's version less likely to be true.

[31] Further, the impact of her evidence upon the credibility or reliability of the complainant's evidence on these counts may have had an effect upon the complainant's evidence more generally. The prosecution case on each count was dependent upon the complainant's testimony. It follows, in our conclusion, that there was a miscarriage of justice caused by the refusal by the prosecution to call Mrs Manning.

[32] The evidence of Mr Phillips was relevant because it had some potential to affect the jury's assessment of the likelihood of offences being committed at the appellant's business premises as the complainant had testified. It may be said that evidence of Mr Phillips was less likely than the evidence of Mrs Manning to affect the jury's assessment of the complainant's testimony. Nevertheless, at least considered with Mrs Manning's testimony, it had a potential to influence the jury's reasoning. It is unnecessary to consider whether, taken alone, the absence of Mr Phillips's evidence would have resulted in a miscarriage of justice.

Conclusion and orders

[33] For these reasons we would allow the appeal, set aside the convictions and order a retrial.

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75 The subject of counts 4-9.
76 AB 65 lines 1-8; AB 299 lines 31-51.
77 AB 65 line 29 to AB 67 line 7.